

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

JAMES S. TATE, JR., M.D.,

Plaintiff,

v.

UNIVERSITY MEDICAL CENTER OF
SOUTHERN NEVADA, *et al.*,

Defendants.

Case No. 2:09-cv-01748-LDG (RJJ)

ORDER

The plaintiff, James S. Tate, Jr., M.D., filed a first amended complaint, alleging four causes of action, against defendants University Medical Center of Southern Nevada ("UMC"), Steve Sisolak, Tom Collins, Larry Brown, Lawrence Weekly, Chris Giunchigliani, Susan Brager, and Rory Reid, in their official capacity as the Board of Trustees of UMC ("Trustees"), The Medical and Dental Staff of UMC ("Medical Staff"), John Ellerton, M.D., and Dale Carrison, M.D. The defendants move to dismiss (#50) all claims alleged in the first amended complaint as to Carrison, and to dismiss the second, third, and fourth claims

1 as to defendants UMC, the Trustees, and Ellerton.¹ Tate opposes the motion (#53), and
 2 defendants have replied (#56). Accordingly, the motion is ripe for consideration.

3 Motion to Dismiss

4 The defendants' motion to dismiss, brought pursuant to Fed. R. Civ. P. 12(b)(6),
 5 challenges whether the plaintiff's complaint states "a claim upon which relief can be
 6 granted." In ruling upon this motion, the court is governed by the relaxed requirement of
 7 Rule 8(a)(2) that the complaint need contain only "a short and plain statement of the claim
 8 showing that the pleader is entitled to relief." As summarized by the Supreme Court, a
 9 plaintiff must allege sufficient factual matter, accepted as true, "to state a claim to relief that
 10 is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).
 11 Nevertheless, while a complaint "does not need detailed factual allegations, a plaintiff's
 12 obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels
 13 and conclusions, and a formulaic recitation of the elements of a cause of action will not do."
 14 *Id.*, at 555 (citations omitted). In deciding whether the factual allegations state a claim, the
 15 court accepts those allegations as true, as "Rule 12(b)(6) does not countenance . . .
 16 dismissals based on a judge's disbelief of a complaint's factual allegations." *Neitzke v.*
 17 *Williams*, 490 U.S. 319, 327 (1989). Further, the court "construe[s] the pleadings in the
 18 light most favorable to the nonmoving party." *Outdoor Media Group, Inc. v. City of*
 19 *Beaumont*, 506 F.3d 895, 900 (9th Cir. 2007).

20
 21 ¹ The defendants also moved to dismiss Tate's prayer for punitive damages
 22 against the Medical Staff as to his §1983 claim. Tate, however, has moved for leave to
 23 amend his complaint (#57), indicating that the sole alteration is the elimination of an
 24 allegation, asserted in ¶11 of the First Amended Complaint, that the Medical Staff is a
 25 subdivision of UMC. In response (#58), the defendants indicate that they do not oppose
 26 the amendment and note that the proposed amendment affects only their argument
 regarding the availability of punitive damages against the Medical Staff. Accordingly, the
 Court will consider, as withdrawn, the defendants' argument regarding the availability of
 punitive damages as against the Medical Staff. Further, as the defendants have not
 opposed the proposed modification, the Court will grant leave to Tate to file a Second
 Amended Complaint that includes the proposed modification and that is otherwise
 consistent with this Order.

1 However, bare, conclusory allegations, including legal allegations couched as
2 factual, are not entitled to be assumed to be true. *Twombly*, 550 U.S. at 555. “[T]he tenet
3 that a court must accept as true all of the allegations contained in a complaint is
4 inapplicable to legal conclusions.” *Ashcroft v. Iqbal* 556 U.S. ___, 129 S.Ct. 1937, 1949
5 (2009). “While legal conclusions can provide the framework of a complaint, they must be
6 supported by factual allegations.” *Id.*, at 1950. Thus, this court considers the conclusory
7 statements in a complaint pursuant to their factual context.

8 To be plausible on its face, a claim must be more than merely possible or
9 conceivable. “[W]here the well-pleaded facts do not permit the court to infer more than the
10 mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—‘that the
11 pleader is entitled to relief.’” *Id.*, (citing Fed. R. Civ. Proc. 8(a)(2)). Rather, the factual
12 allegations must push the claim “across the line from conceivable to plausible.” *Twombly*.
13 550 U.S. at 570. Thus, allegations that are consistent with a claim, but that are more likely
14 explained by lawful behavior, do not plausibly establish a claim. *Id.*, at 567.

15 Factual Background

16 The Court summarized the factual background in granting defendants’ motion to
17 dismiss and dismissing most of the original complaint without prejudice. The Court will not
18 repeat that summary.

19 Claims against Carrison

20 Tate added Carrison as a defendant in his amended complaint, alleging only that
21 Carrison is currently the Chief of Staff of Medical Staff and, as such, is named a defendant
22 in his official capacity. The defendants argue that the addition of Carrison is both untimely
23 and futile, as Tate has not actually alleged any misconduct by Carrison supporting a claim
24 for relief.

25 Tate responds by noting that he added Carrison in his official capacity as the Chief
26 of Staff of Medical Staff due to uncertainty under Nevada law whether a suit can be brought

1 directly against an unincorporated association, such as Medical Staff, or whether suit must
2 be brought against representatives of the unincorporated association who will adequately
3 and fairly defend the interests of the association. Thus, he acknowledges that he has
4 named as defendants both Medical Staff and Carrison as a representative of Medical Staff,
5 to be certain that he has properly brought suit against Medical Staff. Tate further notes that
6 he does not object to the dismissal of Carrison if the defendants concede that naming
7 Carrison as a defendant is unnecessary to bringing suit against Medical Staff.

8 The defendants acknowledge that, pursuant to Rule 17(b)(3)(A), Medical Staff may
9 be sued in its common name as to Tate's §1983 claim. Accordingly, the Court will dismiss
10 Carrison as a defendant to Tate's §1983 claim.

11 The defendants also acknowledge that Nevada law is "less clear" as to whether Tate
12 is able to sue Medical Staff by its common name as to his remaining state law claims.
13 Accordingly, as it may be necessary under Nevada law that Carrison be named as a
14 defendant in his representative capacity of Medical Staff as to Tate's remaining state law
15 claims, the Court will deny defendant's motion to dismiss Carrison as to Tate's state law
16 claims.

17 The Court would note that Tate's arguments as to his reasons for bringing suit
18 against Carrison in his official capacity establish that his suit must be dismissed as against
19 Ellerton, to the extent that he named Ellerton as a defendant in his official capacity. Tate
20 both alleges and acknowledges that Ellerton is no longer the Chief of Staff of Medical Staff.
21 Accordingly, the Court will dismiss Ellerton to the extent he is sued in his official capacity.

22 Contract Claims against UMC and the Trustees

23 In his amended complaint, Tate alleges that he applied for privileges and that in his
24 application he agreed to be bound by the terms of the Bylaws and other governing
25 documents (collectively, Bylaws) of the Medical Staff. He further alleges that UMC and the
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1 Trustees approved his application for privileges, and by so approving, each entered into a
2 contract with him.

3 In moving to dismiss, the defendants argue that this Court previously reviewed the
4 Bylaws and determined that the Bylaws do not impose a contractual obligation on any
5 defendant other than perhaps Medical Staff. The defendants further note that UMC and
6 the Trustees are not parties to the Bylaws. While the defendants acknowledge that Tate
7 alleged that the approval of his application for privileges by UMC and the Trustees created
8 a contract, they dismiss this as a “logical sleight of hand,” and reiterate that neither UMC
9 nor the Trustees are parties to the Bylaws.

10 Tate’s allegation that UMC and the Trustees entered into a contract with him by
11 approving his application for privileges is not a logical sleight of hand. Rather, Tate has
12 asserted new and distinct allegations, such that his contract claim does not rest upon
13 whether UMC or the Trustees are parties to the Bylaws. As the defendants’ motion rests
14 upon the Court’s review of Tate’s original allegations, rather than any analysis or argument
15 as to Tate’s new allegations in his amended complaint, the motion is without merit.

16 The Court would note that, in their reply, the defendants raise the issue whether
17 Tate could have entered into a contract with the Trustees, as the Trustees were acting on
18 behalf of UMC. At this time, the Court need not address the issue. Tate alleged facts
19 permitting an inference that he entered into a contract with the Trustees. Whether the
20 Trustees can defeat that claim by offering evidence that they were acting on behalf of
21 UMC, and whether Tate can offer evidence that the Trustees were not acting on behalf of
22 UMC, are matters properly reserved for summary judgment.

23 Contract Claims against Ellerton

24 In contrast to his contract with UMC and the Trustees, Tate’s allegations in his
25 amended complaint are insufficient to permit an inference that he entered into a contract
26 with Ellerton. Tate alleges that he applied for membership in Medical Staff, and that

1 Medical Staff approved his application. He further alleges that Ellerton applied for
2 membership in Medical Staff, and that Medical Staff approved Ellerton's application.
3 Assuming that Tate has adequately alleged that both he and Ellerton entered into contracts
4 with Medical Staff, he has not offered any Nevada authority² suggesting that these
5 contracts between the unincorporated association and two of its members somehow gave
6 rise to a separate and distinct contract between those two individual members of the
7 association. Accordingly, the Court will dismiss Tate's contract claims against Ellerton.

8 Negligence Per Se

9 The defendants argue that Tate's negligence claim must be dismissed as to UMC,
10 the Trustees, and Ellerton as Tate has not alleged a duty of care established by the
11 violation of a statute. Tate responds that the Supreme Court has recognized that a claim
12 for negligence per se can rest upon the violation of a building code adopted by local
13 ordinance, when the injured party fits within the class of persons intended to be protected
14 by the building code, and the injury is of the type intended to be prevented by the building
15 code. See, *Vega v. Eastern Courtyard, Assoc.*, 117 Nev. 436 (2001). While
16 acknowledging that this case does not concern the violation of a building code, Tate argues
17 that it does involve the Clark County Commissioners acting as the Defendant Board of
18 Trustees approving the Medical Staff's Bylaws. Tate's argument emphasizes that the
19 Bylaws were not promulgated by the Clark County Commissioners acting in their role as
20 Commissioners for Clark County, enacting a local ordinance generally applicable to Clark
21 County. Rather, as pointed out by Tate, the Bylaws were adopted by the Commissioners
22 acting in the ex officio capacity as the Board of Trustees for UMC. Tate has not alleged the
23 violation of an independent duty established by statute, regardless of whether that statute

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25 ² Tate's citations to decisions from other jurisdictions are less than compelling
26 in suggesting that the contract between an unincorporated association and each of its
members constitutes or creates a binding contract between individual members separate
from the contract between the association and the members.

1 is local to Clark County or is general to Nevada. Accordingly, the Court will dismiss his
2 claim for negligence as to UMC, the Trustees, and Ellerton.

3 Therefore, for good cause shown,

4 THE COURT **ORDERS** that Defendants' Motion to Dismiss (#50) is GRANTED in
5 part and DENIED in part as follows:

6 Plaintiff's First Claim for Relief is DISMISSED with prejudice as to Defendant
7 Dale Carrison, M.D.;

8 Plaintiff's Complaint is DISMISSED with prejudice as to Defendant John
9 Ellerton, M.D. in his official capacity;

10 Plaintiff's Second and Third Causes of Action are DISMISSED with prejudice
11 as to Defendant John Ellerton in his individual capacity;

12 Plaintiff's Fourth Cause of Action is DISMISSED with prejudice as to
13 Defendants UMC, Trustees, and John Ellerton, M.D.

14 THE COURT **ORDERS** that James S. Tate's Motion for Leave to Amend to file a
15 Second Amended Complaint (#57) is GRANTED as follows: Plaintiff is granted leave to file
16 a Second Amended Complaint that (a) modifies ¶11 of the First Amended Complaint
17 consistent with the representations of the Plaintiff in his motion, and (b) that is otherwise
18 consistent with this Order.

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20 DATED this 16 day of September, 2011.

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23 Lloyd D. George
24 United States District Judge
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